

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE

UNITED STATES OF AMERICA, )  
 )  
v. ) No. 3:08-CR-142  
 ) Judges Phillips/Shirley  
DAVID C. KERNELL, )  
 a/k/a "rubico," )  
 a/k/a "rubico10," )  
 )  
Defendant. )

UNITED STATES MOTION TO QUASH  
SUBPOENA TO FBI SPECIAL AGENTS

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Comes now the United States and files this Motion to Quash subpoenas issued by the Defendant. Defendant issued subpoenas to FBI Special Agents Steve McFall and Andrew Fisher to testify at the motion hearing scheduled to commence on July 16, 2009. Special Agent Fisher is the affiant on the search warrant application for, among other things, the Defendant's computer. Special Agent McFall is the computer forensic expert who examined the contents of the Defendant's computer. In conjunction with the service of the subpoenas, Defendant's counsel also delivered a letter which states, "Testimony will be sought regarding the specifics of searching and seizing computer systems as described in the affidavit in support of the search warrant as well as the execution of the warrant, including the subsequent forensic examination process as well as all matters set forth in the pending motion to suppress." A copy of the letter and subpoenas are attached as exhibits hereto.

The subpoenas should be quashed because the Defendant has not satisfied the requirement of the applicable regulations (*Touhy* regulations), 28 C.F.R. § 16.21 - 16.29, and because the Defendant has not articulated a need for the testimony. 28 C.F.R. § 16.23(c) provides, “If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party’s attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.” Clearly, defense counsel’s letter does not satisfy the requirements of this regulation. Simply stating, in the broadest terms, the subject matter of the inquiry does not provide a summary of the testimony which would allow the FBI or the attorney for the government to make the assessment required under 28 C.F.R. § 16.23(a).

Under 28 C.F.R. § 16.26(b), disclosure cannot be made if any of the following factor exists: “(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired.” Obviously, asking FBI agents about how computer systems are searched and how forensic examinations are conducted would reveal investigative techniques. Defendant has made no showing of his need for this testimony to challenge the search of his computer. Defendant has been provided with a report prepared by Special Agent McFall which details the results of his forensic examination. He knows precisely what information was seized from his computer. If he believes the search exceeded the scope of the warrant, he should be required to designate what that evidence is before being allowed to call government agents to the stand to conduct a fishing expedition.

Moreover, it is not clear why Special Agent Fisher has been subpoenaed, since the Defendant apparently does not intend to ask him about the facts presented in his affidavit. It

appears that the sole purpose of these subpoenas is to insure that the Defendant has an opportunity to conduct cross-examination of the agents in the event that the United States does not call them as witnesses at the motion hearing. Without a showing of relevance and need by the Defendant, this tactic should not be countenanced.

For all of the above reasons, the Defendant's subpoenas must be quashed.

Respectfully submitted this 15th day of July, 2009.

JAMES R. DEDRICK  
United States Attorney

*S/D. Gregory Weddle  
S/Mark L. Krotoski  
S/Josh Goldfoot*

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#### CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2009, a copy of the foregoing MOTION TO QUASH SUBPOENAS TO FBI AGENTS was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

*S/D. Gregory Weddle*

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